Karn Woon Lin & Anor v Cheah Chor Bok

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–730 OF 1999
BALIA YUSOF J
10 MAY 2010

Succession — Probate — Testamentary capacity — Allegation that testator had no testamentary capacity — Mental disorder or insane delusion — Onus of proof

Succession — Will — Execution — Allegation of mental disorder or insane delusion — Whether deceased had necessary testamentary capacity while executing will — Whether being in a confused state an incapacity — Whether deceased fully oriented and rational and aware of everything — Material point of time to consider testator's mental capacity

Succession — Will — Execution — Validity of — Will not signed but only thumbprinted — Whether sufficient medical reason to explain thumbprinting — Whether thumbprint accepted mode of attestation

Succession — Will — Validity — Burden of proof — Burden on propounder of will to prove on balance of probability testamentary capacity and due execution — Burden on propounder of will to dispel suspicious circumstances surrounding making of second will — Burden on party challenging will to prove vitiating elements — Whether burden discharged

Cheah Keat Lim, the deceased was a widowed school teacher and lived alone until she died in April 1997. The defendant was her blood brother, with whom she had been estranged for over 20 years. Her close friend was the first plaintiff (Amy) who was a school clerk at the same school in which the deceased was a teacher. The relationship between the deceased and Amy became very close over the years and the deceased became god-mother to Amy's daughter. In 1989 the deceased made a will ('first will') naming Amy's daughter as the sole beneficiary of her estate. The plaintiffs were the executors appointed under the first will. The plaintiffs sought a declaration that the first will was the last true and valid will of the deceased and that the will dated 16 April 1999 ('second will') was null and void. The defendant claimed otherwise. The plaintiffs challenged the validity of the second will by claiming that the deceased lacked the testamentary capacity to make the second will and that the second will was made under suspicious

A circumstances perpetrated by the defendant. The defendant claimed that on 12 April 1999 the defendant met the deceased and that she told him that Amy had cheated her and had withdrawn monies from the fixed deposit joint account with her. On the discharge of the deceased from the hospital on 15 April 1999, the defendant had accompanied the deceased and DW4 B (defendant's maternal cousin) to the bank to open her safe deposit box. The deceased was angry and upset with the conduct of Amy and asked the defendant to help her and at the same time telling him that she wanted to give everything to the defendant. The same afternoon, the defendant and DW4 went to a lawyer's office and saw one Annamalai. The next day, on 16 C April 1999 Annamalai and a staff from his office came over to the deceased's house where the second will and a power of attorney was prepared and thumb printed by the deceased. The defendant was the sole beneficiary of the will. DW5, the bank manager testified that during the visit to the bank on 15 April 1999, the deceased was upset and angry with Amy and complained D about being cheated by Amy and describing Amy as being ungrateful. DW5 testified that the deceased was wheel chair bound and weak but knew what she was doing. The deceased had a fall three weeks prior the admission into hospital and was complaining of having poor memory, difficulty in speaking, giddiness and unsteady walking.

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Held, dismissing the plaintiffs' claim and allowing the defendant's counterclaim:

(1) When the validity of a will is challenged, the burden of proving F testamentary capacity and due execution of the same lies on the propounder of the will, as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will (see para G 3).

(2) Based on the totality of the evidence, the defendant as the propounder of the will had on the balance of probabilities proven the testamentary capacity of the deceased at the time of the making of the will. At the time of the making of the impugned will, the deceased was aware of H what she was doing and know exactly the nature of her acts (see paras 11 & 13).

(3) While the testator's mental condition on the day of the execution of the alleged will is important, a determination of that mental condition I should not be confined to what was perceived on just that day only. There was no evidence of mental disorder or insane delusion. The deceased while in the hospital was at times, in a confused state. That condition of confused state was on and off. Confusion, is not an incapacity. In any event the doctors confirmed that the second will

could also have been done when the deceased was experiencing a lucid interval, when the patient was fully oriented and rational and aware of everything (see paras 13–14).

(4) There was no sufficient evidence to support the plaintiff's allegation of fraud against DW1 and DW4 and also the allegation of their conspiracy with Annamalai (see para 19).

(5) As to the non-signing of the will but was only thumb printed, there was sufficient medical reason to explain that, and in any event, a thumbprint is just another mode of attestation (see para 23).

(6) The defendant took a benefit under the will but he was not the writer and neither did he prepare the will. It was prepared by Annamalai. The burden of dispelling any suspicious circumstances that may surround the making of the will may be discharged by showing that the deceased, being of competent mind, knew and approved of the contents of the will. The deceased had approved the will and had attested to it by thumb printing the same, witnessed by DW4 and an employee of Annamalai. The thumb printing of the will on 16 April 1999 was the culmination of her intention to change her will and leaving everything to the defendant which she had expressed to DW4 on 9 April 1999 and again to both DW4 and the defendant on 15 April 1999 (see para 24).

[Bahasa Malaysia summary

Cheah Keat Lim, si mati merupakan seorang balu yang bekerja sebagai guru sekolah dan tinggal bersendirian sehinggalah dia meninggal dunia pada April 1997. Defendan merupakan abang/adik kandungnya, tetapi hubungan mereka renggang selama 20 tahun. Sahabat karibnya adalah plaintif pertama ('Amy') yang merupakan kerani di sekolah yang sama di mana si mati mengajar. Hubungan antara si mati dan Amy menjadi akrab setelah bertahun-tahun dan si mati adalah ibu pembatisan kepada anak perempuan Amy. Pada 1989 si mati membuat wasiat ('wasiat pertama') menamakan anak perempuan Amy sebagai benefisiari tunggal harta pusakanya. Plaintif-plaintif merupakan pentadbir yang dilantik di bawah wasiat pertama. Plaintif-plaintif memohon pengisytiharan bahawa wasiat pertama merupakan wasiat terakhir dan sah si mati dan bahawa wasiat bertarikh 16 April 1999 ('wasiat kedua') adalah batal dan tak sah. Defendan pula mendakwa sebaliknya. Plaintif-plaintif mencabar kesahan wasiat kedua dan bahawa wasiat kedua tersebut dibuat dalam keadaan yang mencurigakan yang dilakukan oleh defendan. Defendan mendakwa bahawa pada 12 April 1999 defendan berjumpa si mati dan dia memberitahunya bahawa Amy menipunya dan telah mengeluarkan wang daripada akaun simpanan tetap bersamanya. Apabila si mati dibenarkan keluar dari hospital pada 15 April 1999, defendan telah menemani si mati dan DW4 (sepupu sebelah emak defendan) ke bank untuk membuka peti simpanan selamatnya. Si mati marah dan sedih dengan

A tindakan Amy dan meminta defendan membantunya dan pada masa yang sama memberitahu defendan bahawa dia mahu menyerahkan segalanya kepada defendan. Tengahari itu, defendan dan DW4 ke pejabat peguam dan menemui Annamalai. Keesokan harinya, pada 16 April 1999 Annamalai dan seorang pekerja dari pejabatnya datang ke rumah si mati di mana wasiat B kedua dan surat kuasa wakil disediakan dan dicapjarikan oleh si mati. Defendan merupakan benefisiari tunggal wasiat tersebut. DW5, pengurus bank memberi keterangan bahawa semasa lawatannya ke bank pada 15 April 1999, si mati sedih dan marah kepada Amy dan mengadu ditipu Amy dan menyatakan bahawa Amy tidak kenang budi. DW5 memberi keterangan C bahawa si mati menggunakan kerusi roda dan lemah tetapi tahu apa yang dia lakukan. Si mati telah jatuh tiga minggu sebelum dimasukkan ke hospital dan mengadu ingatannya lemah, susah bercakap, pening dan berjalan terhuyung-hayang.

D **Diputuskan**, menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan:

(1) Apabila kesahan wasiat dipersoalkan, beban membuktikan keupayaan perwasiatan dan pelaksanaannya terletak pada orang yang mengajukan E pembuatan wasiat tersebut, begitu juga dengan beban melenyapkan sebarang keadaan mencurigakan yang mungkin meliputi penulisan wasiat tersebut. Walau bagaimanapun, beban membuktikan elemen tambahan yang merosakkan seperti pengaruh tak wajar, fraud atau pemalsuan terletak pada orang yang mempersoalkan wasiat tersebut F (lihat perenggan 3).

(2) Berdasarkan keseluruhan keterangan, defendan sebagai orang yang mengajukan pembuatan wasiat tersebut, atas imbangan kebarangkalian telah membuktikan keupayaan pewasiatan si mati pada masa membuat wasiat tersebut. Pada masa penulisan wasiat yang dipersoalkan itu, si G mati maklum apa yang dilakukannya dan tahu sebenar-benarnya tindakannya (lihat perenggan 11 & 13).

(3) Walaupun keadaan mental pewasiat pada hari penyempurnaan wasiat tersebut adalah penting, namun penentuan keadaan mental tersebut H tidak harus terhad kepada apa yang dilihat pada hari itu sahaja. Tiada keterangan mengenai sakit otak atau delusi hilang akal. Semasa dalam hospital, ada masanya si mati dalam keadaan keliru. Keadaan kekeliruan tersebut adalah kadang-kadang. Kekeliruan bukanlah kekurangan upaya. Doktor-doktor mengesahkan bahawa wasiat kedua juga I mungkin dibuat apabila si mati dalam waktu waras, apabila pesakit berfikiran wajar, rasional dan sedar akan sekelilingnya (lihat perenggan 13–14).

(4) Tiada keterangan mencukupi untuk menyokong dakwaan fraud plaintif-plaintif terhadap DW1 dan DW4 dan juga dakwaan konspirasi mereka dengan Annamalai (lihat perenggan 19).

(5) Berkenaan wasiat yang tidak ditandatangani dan sebaliknya dicapjarikan, terdapat cukup alasan perubatan untuk menjelaskannya, dan juga cap jari merupakan salah satu cara pengakusaksian (lihat perenggan 23).

(6) Defendan mempunyai faedah dalam wasiat tersebut tetapi dia bukanlah penulisnya dan dia juga tidak menyediakan wasiat tersebut. Wasiat itu disediakan oleh Annamalai. Beban melenyapkan sebarang keadaan mencurigakan yang mungkin meliputi pembuatan wasiat tersebut boleh dilakukan dengan menunjukkan bahawa si mati, dalam keadaan berfikiran waras, tahu dan mengesahkan isi kandungan wasiat tersebut. Si mati telah mengesahkan wasiat tersebut dan mengakusaksikannya dengan cap jari, disaksikan oleh DW4 dan seorang pekerja Annamalai. Cap jari atas wasiat pada 16 April 1999 merupakan kemuncak niatnya untuk menukar wasiatnya dan menyerahkan segalanya kepada defendan yang mana dia telah beritahu DW4 pada 9 April 1999 dan sekali lagi kepada DW4 dan defendan pada 15 April 1999 (lihat perenggan 24).]

Notes

For cases on execution, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2529–2534.

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2568–2579.

For cases on validity, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2643–2646.

Cases referred to

Banks v Goodfellow (1870) LR 5 QB 549 (refd)

Billinghurst v Vickers, formerly Leonard (1810) 161 ER 956 (refd)

Brown v Fisher (1890) 63 LT 465 (refd)

Choo Ah Pat v Chow Yew Wah & Anor [1974] 1 MLJ 62, HC (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Eu Boon Yeap & Ors v Ewe Kean Hoe [2008] 2 MLJ 868; [2007] 6 CLJ 791, CA (refd)

Hegarty v King (1880) 5 LR Ir 249 (refd)

Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

R Mahendran & Anor v R Arumuganathan [1999] 2 SLR 579, CA (refd)

A *Sarah bt Abdullah & Hew Lee Ling (p) v Kwok Pek Wah (p) & Anor* [2009] 6 MLJ 385, CA (refd)
Tan Teck Khong & Anor (suing as Committee of the Estate of Pang Jong Wan) v Tan Pian Meng [2002] 4 SLR 616, HC (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 3 AMR
B 3703, CA (refd)

Legislation referred to

Evidence Act 1950 s 73A

C *Karin Lim (Balwant Singh with her) (Presgrave & Matthews) for the plaintiffs. Balasundaram (Balasundaram & Co) for the defendant.*

Balia Yusof J:

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[1] Cheah Keat Lim, the deceased was a widowed school teacher and lived alone with her pet dogs in her own home at No 50 Moulmein Road, Penang until she died in April 1997. She had a blood brother Cheah Chor Bok, the defendant, with whom she had been estranged for over 20 years. Her close
E friend was the first plaintiff, Amy Karn Woon Lin, who was a school clerk at Pulau Tikus Convent, the same school in which the deceased was a teacher and whom the deceased had befriended. The relationship between the deceased and Amy became very close over the years. The deceased became the god-mother to Amy's daughter. In 1989 the deceased made a will ('the first
F will') naming Amy's daughter as the sole beneficiary of her estate.

[2] The plaintiffs are the executors and trustees appointed under the first will and are now claiming for a declaration that the first will dated 29 March 1989 is the last true and valid will of the deceased and also for a declaration
G that the will dated 16 April 1999 (hereinafter referred to as the second will) is null and void. The defendant is claiming otherwise. In essence, the plaintiffs are now challenging the validity of the deceased's second will. The plaintiffs are contending that the deceased lacked the testamentary capacity to make the said will and the same was made under suspicious circumstances. It
H had been obtained by undue influence and fraud perpetrated by the defendant.

[3] It is settled law that when the validity of a will is challenged, the burden of proving testamentary capacity and due execution of the same lies on the
I propounder of the will, as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will (see *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2007] 6 CLJ 791, *Dr Shanmuganathan*

v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

THE DEFENDANT'S CASE

[4] In proving the validity of the second will, the defendant offered five witnesses including himself. The defendant testified that the deceased, Madam Cheah Keat Lim was his sister. They have been estranged for over 20 years but used to bump into each other during temple functions and at their relative's house during Chinese New Year. He is also kept informed about the deceased by DW4, his maternal cousin. On 12 April 1999 the defendant met with the deceased at DW4's house. The defendant was told that Amy had cheated her and had withdrawn monies from the fixed deposit joint account with her. According to the defendant, the condition of the deceased at that time was okay and alert although she looked tired. On the discharge of the deceased from the Gleneagles Hospital on 15 April 1999 he accompanied the deceased and DW4 to the Public Bank in Pulau Tikus to open her safe deposit box. They spent quite sometime at the bank to wait for Amy but she never showed up. They went home after the bank manager received a letter from the first plaintiff's lawyer regarding the opening of the safe deposit box. The deceased was angry and upset with the conduct of Amy and asked the defendant to help her and at the same time telling him that she wanted to give everything to the defendant. The same afternoon, the defendant and DW4 went to a lawyer's office and saw one Mr Annamalai. The next day, on 16 April 1999 Mr Annamalai and a staff from his office came over to the deceased's house where the second will and a power of attorney was prepared and thumb printed by the deceased. The defendant is the sole beneficiary of the will. DW4 and Mr Annamalai's staff were witnesses to the said will. According to the defendant, the deceased was not able to write but thumb printed the will and the power of attorney, she spoke normally and coherently when questioned by Mr Annamalai and was alert although physically weak.

[5] The evidence of the defendant, DW1, is corroborated by DW4, his maternal cousin and that of the deceased. DW4 kept a 'diary' of the events from the deceased's admission to hospital until her death. In her evidence, DW4 states that the deceased had been complaining about Amy taking things from her and withdrawing money from their joint account. The deceased had asked for her help to contact the defendant whose nickname is Bobby to help her. DW4 took the deceased out of hospital on various occasions namely on 9, 10, 11 and 12 April 1999. She took the deceased to the bank and to her house for the deceased to see her dogs. While in the hospital, the deceased was complaining of missing her dogs. Upon her discharge from the hospital on 15 April 1999, DW4 took the deceased to the Public Bank in Pulau Tikus accompanied by the defendant. The deceased

A became angry when she was not able to open the safe deposit box held jointly in the name of the first plaintiff. On the same day the deceased informed DW4 that she wanted to change her will and bequeath everything to Bobby. DW4 also corroborated the evidence of DW1 in respect of Mr Annamalai's visit to the deceased's house on 16 April 1999 to have the will prepared after B meeting both DW1 and DW4 at his office a day earlier. DW4 was a witness to the thumb printing of the will by the deceased together with Mr Annamalai's clerk. DW4 also testified on the condition of the deceased at the time of the making of the will, wherein the deceased was described to be alert and coherent and knowing exactly what she was doing although weak. C During cross-examination, DW4 stated that the deceased first told her about her intention of changing the will on 9 April 1999 when the deceased was taken to her house and was complaining about Amy.

D **[6]** Exhibit D2 is a diary kept by DW4 recording the events that took place from 7 April 1999, the day the deceased was admitted to the hospital. The recordings contain the various accounts made by DW4 in respect of the various transactions made regarding the shares, fixed deposit accounts and the safe deposit box which the deceased had and various visits to the bank made E by the deceased accompanied by DW4. Having considered the totality of the notes in the said 'dairy' it seems clear that the deceased has full knowledge of what was going on in respect of her moneys and what Amy has been doing. It shows the deceased was in and out of the hospital to the bank and to her house. The deceased was also taken back to see her house and her dogs. On F the making of the will and the power of attorney on 16 April 1999, there are notes to that effect, of Mr Annamalai's coming over to the house and of him asking the deceased about her wanting to give the house and power of attorney to Bobby. It also described the deceased answering Mr Annamalai's question in good English.

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[7] DW5 is a bank manager who merely testified narrating the events that took place at the bank on 9 April 1999 and 15 April 1999 regarding the attempts of the deceased to open the safe deposit box maintained at the bank. On both occasions she noted that the deceased was weak and frail. On the H visit to the bank on 15 April 1999, DW5 stated that the deceased was upset and angry with Amy and complaining about being cheated by Amy and describing Amy as being ungrateful. DW5 also testified that the deceased was wheel chair bound and weak but knew what she was doing. DW5 saw the deceased again on 19 April 1999 when she came to have access to her safe I deposit box in the bank.

[8] The defendant called two doctors to testify on the medical condition of the deceased. DW2, one Dr Gunasekaran a neuro surgeon from the Gleneagles Medical Centre Penang, stated that the deceased was admitted to

the hospital on 7 April 1999. From the medical records tendered in evidence, it states that the deceased had a fall three weeks prior the admission and was complaining of having poor memory, difficulty in speaking, giddiness and unsteady walking. Following further investigations the deceased was treated as a case of cerebral vascular disease and she was commenced on physiotherapy. The medical report tendered by way of the agreed documents stated that while in the ward, the patient was noticed to be confused on and off. She also required help for personal hygiene. On 13 April 1999 she appeared depressed, was crying and was concerned that there was no one to look after her dogs. She was commenced on antidepressant medication. On 14 April 1999 she was quite alert but appeared confused at times. She was discharged on 15 April 1999. Besides the medical report, there is also the nursing notes tendered by way of agreed documents indicating the condition of the deceased on 12 and 13 April 1999 as confused at times, looking weak and tired. On 15 April 1999 DW2 saw the deceased, described her to be in satisfactory condition and ready to return home anytime. On the report of the deceased being confused on and off, DW2 explained that the patient was not able to recognise the nurses, need assistance to have her meals, to go to toilet and forgetful. The nursing notes also indicate the patient was taken out of the hospital on a number of occasions.

[9] DW3, another doctor called by the defence testified that the deceased was admitted to the Island Hospital, Penang on 20 April 1999 although he had seen the deceased a day earlier on 19 April 1999. His diagnosis showed the deceased was suffering from dementia and spread of cancer to the brain. DW3 described the deceased as having poor memory and disoriented. Questioned on the condition of the deceased on 15 April 1999, DW3 agreed with the plaintiff's counsel suggestion that at that point in time the deceased can at times be in a confused state of mind and agreed that cancer cells were present in her brain but disagreed that she was not able to give any informed consent. DW3 further testified that generally the condition of the deceased at the time she was discharged from his hospital on 7 May 1999 was poor.

THE PLAINTIFFS' CASE

[10] The first plaintiff gives evidence stating that when she visited the deceased at home on 6 April 1999, the deceased looked confused and had slurred speech. She was complaining about not able to find the RM300 which she had earlier withdrawn from the bank on that day. The deceased also requested DW1 to take her to see a doctor. The deceased was admitted to the Gleneagles Medical Centre on 7 April 1999. On the visit of the deceased to the bank together with DW4 and with DW5 attending to them, the first plaintiff says that the deceased was oblivious to everything that happen. When she visited the deceased on 10 April 1999 she noticed that the

thumb of the deceased was full of black ink noting that the deceased was earlier taken out of the hospital by DW4. She claims DW4 was hostile, did not allow her to visit the deceased on 13 April 1999 and 14 April 1999 and there was a dispute about the fixed deposit accounts and the safe deposit box keys. She withdrew RM7,298.40 from the deceased's personal account in Pacific Bank on 8 April 1999 and put into her joint account with the deceased and subsequently withdrew RM5,000 from the said account to pay the hospital bills. She further states that she only became aware of the deceased's new will after her death and asserts that the condition of the deceased as stated in the 'diary' (exh D2) on 16 April 1999 is not true. It was done by DW4 and DW1 for the purpose of the trial and there are many additions to the entries. She further alleges undue influence and fraud by DW1 and DW4. According to her there were fraudulent misrepresentations made about her and that the entries in the diary do not show the contemporaneous events that took place. The first plaintiff further alleges the dissipation of the deceased's asset by the defendant after the second will was made in the form of withdrawals from the deceased's bank account totaling RM46,448.11. She denies cheating the deceased and claims that the second will was not made on 16 April 1999 as alleged but was taken by DW1 and DW4 from Mr Annamalai's office on 19 April 1999 when the deceased's first will was found in the safe deposit box No 610. The said safe deposit box was opened on 19 April 1999.

DECISION

[11] Having considered the totality of the evidence, the court comes to the conclusion that the defendant as the propounder of the will has on the balance of probabilities proven the testamentary capacity of the deceased at the time of the making of the will. *Theobold on Wills* (14th Ed) p 30 states:

> *Time for satisfying the test*. The testator must have testamentary capacity at the time when he executes the alleged Will. Alternatively, it suffices if the testator has testamentary capacity at the time when he gives instructions to a solicitor for the preparation of the alleged Will provided (i) the alleged Will is prepared in accordance with his instructions and (ii) at the time of execution he is capable of understanding, and does understand, that he is executing a will for which he has given instructions.

[12] In *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 the court states:

> The requisite for the substantial as distinct from the formal validity of a will is that the testator's mind must go with his testamentary act. It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding — words which have consistently been held to mean sound disposing mind. It is essential that the testator should know and approve of its contents (*Hastilow v*

> *Stobie* (1865) LR 1 P & D 64; *Guardhouse v Blackburn* (1866) LR 1 P & D 109). Unless suspicion attaches to the document, the testator's execution is sufficient evidence of his knowledge and approval (*Guardhouse v Blackburn*).... If knowledge and approval are clearly established at the time of giving instructions for a will, or drafting it, very little evidence of the position at the time of execution is required (*Re Wallace & Ors, Solicitor of the Duchy of Cornwall v Batten* [1952] 2 TLR 925).

In *Banks v Goodfellow* (1890) LR 5 QB 549, Cockburn CJ said:

> It is essential ... that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and there shall with a view to the latter object, be no disorder of the mind that shall poison his affection, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal it which, if his mind had been sound, would not have been made ...

[13] From the evidence of DW1, DW4 and DW5, it is my considered view that at the material time, namely on 16 April 1999, the time of the making of the impugned will, the deceased was aware of what she was doing and know exactly the nature of her acts. There is no sufficient reason for this court to disbelief or reject the evidence of these witnesses. The evidence of DW5 especially, who is totally independent and a disinterested party to the transaction, when seeing the deceased coming to the bank to open her safe deposit box, speaks a lot about the mental faculty of the deceased on 15 April 1999 just a day before the making of the will. This is further affirmed by the evidence of DW1 and DW4. As to the most material date of 16 April 1999, the evidence of DW1 and DW4 leaves me in no doubt as to the ability and understanding of the deceased in making the will. I am also fully appraised of the fact that while the testator's mental condition on the day of the execution of the alleged will is important, a determination of that mental condition should not be confined to what was perceived on just that day only (see *Tan Teck Khong & Anor (suing as Committee of the Estate of Pang Jong Wan) v Tan Pian Meng* [2002] 4 SLR 616).

[14] In so far as the medical evidence goes, the evidence of Dr Gunasekaran, DW2 states that upon her discharge from the hospital on 15 April 1999, the deceased was alert and in satisfactory condition and ready for home. While in the hospital, the deceased was at times in a confused state and depressed but there is nothing to show that she lacks the mental capacity. There is certainly no evidence of mental disorder or insane delusion. Immediately upon discharge she was at the bank and there, the deceased was described by DW5 as fully conscious of what she was doing. She was upset and angry and was complaining about Amy and accusing Amy of being ungrateful. In my view, the deceased was in her own self and has the faculty

of understanding and appreciation of the whole circumstances and situation she was in. At most, the evidence of DW2 merely shows that the deceased while in the hospital was at times, in a confused state. That condition of confused state was on and off. Confusion, in my view is not an incapacity. In any event both doctors, DW2 and DW3 further confirm that the will made on 16 April 1999 could also have been done when the deceased was experiencing a lucid interval. Lucid interval according to DW2 refer to the period when the patient is fully oriented and rational and aware of everything. *Meriam-Webster*'s medical dictionary defines lucid interval as a temporary period of rationality or neurological normality. 'Lucid Interval does not mean a perfect restoration to reason but a restoration so far as to be able beyond doubt to comprehend and do an act with such reason, memory and judgment as to make it legal' (*Words, Phrases and Maxims Legally and Judicially Defined* by Ananda Krishnan). The evidence of DW1, DW4 and DW5 clearly show that the deceased had a good mental faculty on 15 and 16 April 1999.

[15] It is my finding that the evidence of DW3, Dr Hanifah of the Island Hospital Penang has not much value in so far as proof of the deceased's mental capacity to make the will. DW3 saw the deceased only on 19 April 1999, three days after the second will was made. I am of the view that the medical report at pp 134–135 of CABD1 does not help the defendant's case to prove the deceased testamentary capacity. The relevant and material point of time at which the mental capacity of the deceased falls to be determined is the time at which the will was made and not some other earlier or later point of time (see *Billinghurst v Vickers, formerly Leonard* (1810) 161 ER 956 at p 958, *Choo Ah Pat v Chow Yew Wah & Anor* [1974] 1 MLJ 62 at p 67, *R Mahendran & Anor v R Arumuganathan* [1999] 2 SLR 579 at p 586, *Banks v Goodfellow* (1870) LR 5 QB 549).

[16] Gopal Sri Ram JCA (as he then was) in *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 at pp 100–102; [2002] 3 AMR 3703 stated:

> Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that *very slight testamentary capacity is required for the making of the will*. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.
>
> *What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will.* There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here. We would merely refer to three.

In *Judah v Isolyne Bose* AIR 1945 PC 174, Lord Goddard when delivering the advice of the Privy Council held that the mere fact that the testatrix was unwell when she executed her will was a long way from saying that she had no testamentary capacity. (Emphasis added.)

[17] In my considered view, the medical evidence tendered in the instant case does not show that the deceased lacks the testamentary capacity. Taken in its totality together with the evidence of DW1, DW4 and DW5, I am satisfied on the balance of probabilities that the defendant being the propounder of the will has discharged his burden of proving the deceased's testamentary capacity. There is nothing inherently improbable in the evidence of these witnesses and neither was their evidence discredited during the severe cross-examination by counsel for the plaintiff.

[18] In challenging the will, the plaintiffs have also alleged suspicious circumstances in the making of the same. The plaintiffs also alleges collusion between DW1, DW4 and Annamalai and further contended there was fraud committed by DW1 and DW4. The plaintiffs are also saying DW1 and DW4 had conspired to defraud the deceased from the moment she was admitted to the Gleneagles Hospital and have dissipated the assets of the deceased.

[19] In the consideration of the evidence, I am unable to find sufficient evidence to support the plaintiffs' allegation of fraud against DW1 and DW4 and also the allegation of their conspiracy with Annamalai. The evidence given by the plaintiffs is not sufficient to prove fraud and conspiracy against those alleged and the plaintiffs have failed to meet the standard of proof required to prove fraud and has not discharged the burden which she carries.

[20] In the course of the trial, the defence attempted to introduce a witness statement made by Mr Annamalai who has since died. It was met with strong objections by the plaintiff and upon hearing submissions by both parties, the court disallowed the introduction of that statement pursuant to the provisions of s 73A of the Evidence Act 1950.

[21] On the issue of suspicious circumstances in the making of the will, it is proven that the will was made one day after the discharge of the deceased from the hospital. The defendant has been estranged from the deceased for 20 years and suddenly becomes the sole beneficiary of the will and was also given a power of attorney. The will was only thumb printed and not signed by the deceased. It was not attested to by a lawyer, although Mr Annamalai, a lawyer prepared the will. The deceased has poor memory and poor understanding because of old age and she was unwell and weak. These factors are, according to the plaintiffs, the suspicious circumstances surrounding the making of the will. *Theobold on Wills* (15th Ed) at p 31 in commenting on suspicious

A circumstances in the context of wills suggests that it must relate to circumstances surrounding the making of the will and they ought to be circumstances attending or at least relevant to the preparation and execution of the will itself and not circumstances surrounding the testamentary capacity of the testator (see also *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ
B 97; [2002] 3 AMR 3703).

[22] The burden is on the defendant as the propounder of the will to dispel these suspicious circumstances (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Sarah bt Abdullah*
C *& Hew Lee Ling (p) v Kwok Pek Wah (p) & Anor* [2009] 6 MLJ 385).

[23] In my view what is and what is not suspicious circumstances depends very much of the facts and circumstances of each case. It does not surprise me
D a bit that the defendant who has been estranged from the deceased for 20 years suddenly became the sole beneficiary of the deceased's will. After all, the defendant is her own brother and the deceased has felt betrayed and was cheated by the first plaintiff. She was angry with her and that prompted her to change her will. As to the non-signing of the will but was only thumb
E printed, there is sufficient medical reason to explain that, and in any event, a thumbprint is just another mode of attestation.

[24] A party who writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court,
F he must give clear proof that the testator knew and approved of that part under which he takes a benefit (see *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457, *Hegarty v King* (1880) 5 LR Ir 249, *Brown v Fisher* (1890) 63 LT 465). The defendant takes a benefit under the will but
G he is not the writer and neither did he prepare the will. It was prepared by Annamalai. The defendant and DW4 had earlier received instruction from the deceased on 15 April 1999. DW4 went further to state that the deceased had prior to 15 April 1999 expressed her intention of wanting to change her will on 9 April 1999. On that evidence, it cannot be said that the defendant
H was the writer or that he prepared the will. Be that as it may, the burden of dispelling any suspicious circumstances that may surround the making of the will may be discharged by showing that the deceased, being of competent mind, knew and approved of the contents of the will (see *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2007] 6 CLJ 791). I have found as a
I fact that the deceased had approved the will and had attested to it by thumb printing the same, witnessed by DW4 and an employee of Mr Annamalai. The thumb printing of the will on 16 April 1999 was the culmination of her intention to change her will and leaving everything to the defendant which she had expressed to DW4 on 9 April 1999 and again to both DW4 and the

defendant on 15 April 1999.

CONCLUSION

[25] For the reasons above stated, the plaintiffs' claim against the defendant is hereby dismissed and the defendant's counterclaim against the plaintiffs as enumerated in para 19(a), (b), (c) and (d) of the statement of defence and counterclaim is hereby allowed.

Plaintiffs' claims dismissed and defendant's counterclaim allowed.

Reported by Kanesh Sundrum